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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 305

WALTER W. BURNS, PETITIONER

v.

OLIVER L. SPILLER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memoranda and orders of the United States District Court for the District of Columbia (R. 9–12) are not reported. The opinion of the Court of Appeals for the District of Columbia (R. 13) is reported at 161 F. 2d 377.

JURISDICTION

The judgment of the Court of Appeals was entered on March 24, 1947 (R. 14). A petition for rehearing was denied on May 29, 1947 (R. 15). The petition for writ of certiorari was filed on August 29, 1947. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, where the district court dismissed petitioner's complaint on the ground, *inter alia*, that it contravened Rules 8(a) and 8 (e) of the Federal Rules of Civil Procedure, where there was and is no claim by petitioner that his complaint did comply with these Rules, and where his appeal to the court below was based solely on the other grounds set forth in the district court's order, the court of appeals erred in relying on the failure to comply with Rules 8 (a) and 8 (e) as the ground of its decision, and in refusing to pass on the grounds of the district court's holding from which petitioner had appealed.

2. Whether the complaint in the present case, seeking to recover damages for an alleged conspiracy among government officers and characterizing the conduct on which the conspiracy is based as wrongful, unlawful and malicious, discloses the conduct sufficiently to enable the court to judge whether it is tortious.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The Federal Rules of Civil Procedure provide in pertinent part:

> Rule 8. General Rules of Pleading.
>
> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether

an original claim, counterclaim, cross-claim, or third-party claim, shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *.

* * * * *

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

* * * * *

Rule 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.

* * * * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: * * * (6) failure to state a claim upon which relief can be granted. * * *

* * * * *

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service

of the pleading upon him or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading.

(g) Consolidation of Motions. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. * * *

* * * * *

STATEMENT

On May 6, 1944, petitioner, formerly a Colonel on active duty in the Army of the United States, filed in the United States District Court for the District of Columbia, a "Complaint for Conspiracy and Deprivation of Constitutional Rights" against nine defendants, all of whom, including respondents herein, were fellow army officers of comparable rank,[1] individually and as members of conspiracies against petitioner, first to have him declared insane, and later when this attempt failed, to deprive him of his constitutional rights (Tr. 1–2).[2] In the complaint, which consisted of 32 legal size typewritten pages, petitioner set out in detail the alleged conspiracies which con-

[1] Respondent Spiller was, and still is, a Brigadier General; respondent Grayson was a Lieutenant Colonel in the Medical Corps; respondent McCallum was a chaplain with rank of Lieutenant Colonel; and respondent Mann was, and still is, a Colonel.

[2] The unprinted portion of the record, which is on file with the Clerk, will be referred to as "Tr."

spiracies relate mainly to his experiences in the Army during the period from January 6, 1941 to October 10, 1941, the date when petitioner resigned (Tr. 3–32). On motion by respondents Grayson and McCallum (Tr. 34),[3] the complaint was ordered dismissed as to them, with leave granted to file an amended complaint (R. 11–12). As indicated in the memorandum accompanying the order, one of the reasons for the dismissal was that the complaint did not comply with Rules 8 (a) and 8 (e) of the Federal Rules of Civil Procedure, which require that pleadings be simple and concise (R. 10).

Thereafter, on May 1, 1945, an "Amended Complaint for conspiracy and Deprivation of Constitutional Rights" was filed against the same defendants (R. 1). The amended complaint named as defendants the same nine army officers and alleged that the suit was brought "against the defendants individually and as members of conspiracies against plaintiff to first have plaintiff deprived of his liberty and declared insane and later when this attempt * * * failed, to deprive [him] of his liberty and other rights" under the Constitution (R. 2). The alleged conspiracies were again based on petitioner's experiences while he was in the Army in 1941. The complaint alleged that respondents "wrongfully

[3] At that time, service had been made on only these two respondents.

and maliciously" conspired (1) to have petitioner "incarcerated" in William Beaumont General Hospital at El Paso, Texas (R. 3); (2) to submit false reports for the purpose of, and the reports did have the result of, prolonging petitioner's false imprisonment (R. 3); (3) to threaten and cause petitioner to be threatened with a Class "B" Board in order that respondents might have an opportunity to attempt to have petitioner held inefficient as an army officer unless petitioner would cease attempting to have himself declared of sound mind by the medical authorities (R. 4); (4) to defame petitioner's good name and did cause to have a meeting of petitioner's officers, at which, with respondent Mann in charge, respondent McCallum falsely and maliciously stated that petitioner had committed a terrible crime (R. 4); (5) to have petitioner "put off" active duty on the false ground that he had hypertension (R. 5); (6) to have a false and malicious report published that petitioner at a dance had performed a "solo" dance (R. 5); (7) to issue a malicious and illegal written order forbidding petitioner to speak to certain civilians in El Paso, Texas (R. 5); (8) to threaten to give petitioner a secret trial at once unless petitioner resigned within twelve hours after the threat was made (R. 6); and (9) to interfere with petitioner's personal first class mail by opening it and preventing the delivery of some

of the mail to petitioner (R. 6). It was also alleged that respondents did order subordinates to "get him [petitioner] on something" (R. 3); and that respondents issued malicious and unlawful military orders preventing persons under military jurisdiction from talking to or otherwise communicating with petitioner (R. 3).

Respondents Spiller, Grayson, McCallum, and Mann, moved to strike the complaint, or in the alternative, to dismiss it on the grounds that (1) the complaint showed on its face that it was barred by the statute of limitations and (2) the complaint failed to state a cause of action on which relief might be granted (R. 7, 8).[4] The district court denied the motions to strike but granted the motions to dismiss on the same grounds as the original complaint was dismissed (R. 9). In its memorandum accompanying the order, the court stated that the amended complaint was unchanged in substance from the original complaint.

On appeal, the Court of Appeals, in a *per curiam* opinion, affirmed the district court (R. 13). It based its holding solely on the grounds (1) that the complaint contravened Rule 8 (a)

[4] Subsequent to the dismissal of the original complaint, service was made on respondents Spiller and Mann as well as respondents Grayson and McCallum. The other five respondents have not been served, nor have they appeared voluntarily. Therefore, although petitioner lists their names as respondents, they are not parties to this proceeding.

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of the Federal Rules of Civil Procedure by failing to contain a "short and plain statement of the claim" and (2) that the complaint did not contain any statement showing that the petitioner was entitled to relief, since "though it characterizes [respondents'] conduct as wrongful, unlawful, and malicious, it does not sufficiently disclose the conduct to enable a court to judge whether or not it was tortious" (R. 13).

ARGUMENT

Most of the matters and questions discussed in the petition are not involved here. Petitioner admits (Pet. 7, 10–11) that in the present posture of the case there is no question involved in regard to the infringement, alleged in the complaint (R. 2), of his constitutional rights, including those of free speech. Moreover, the question "whether the statements and acts of officers of the United States are privileged, even though such statements or acts are malicious", which is the only question petitioner urges as one of general importance (Pet. 4–6) is not here in issue, for, as petitioner admits (Pet. 7, 10), the court below refrained from passing on that point (R. 13). Nor, as is clear from the opinion (R. 13) and as petitioner admits (Pet. 7, 10, 11), did the court below pass on the additional question also raised in the petition (Pet. 9), whether suit on the alleged slanderous statements was barred by the statute of limitations.

The sole questions involved are those relating to the grounds on which the court below affirmed the dismissal of the complaint, *i.e.*, whether the complaint complied with Rules 8 (a) and 8 (e), F. R. Civ. P., and whether the allegations that certain acts and conduct were "wrongful, unlawful, and malicious" is an adequate substitute for the failure otherwise sufficiently to disclose the conduct on which the action is based. The affirmance, we believe, was correct, and we submit that the decision below, based solely on questions of pleading which were correctly decided, raises no question of warranting further review by this Court.

1. There is no contention made here nor was the contention advanced in the petition for rehearing in the court below, that the complaint actually complied with Rules 8 (a) and 8 (e), F. R. Civ. P. Instead, petitioner claims that the district court did not base its decision on his failure to comply with the Rules, and that therefore the court below improperly relied on that deficiency in affirming the dismissal of his complaint. But it is clear, contrary to petitioner's contention (Pet. 7, 10), that the district court did hold that the complaint contravened Rules 8 (a) and 8 (e). The original complaint consisted of 32 legal size typewritten pages and was made up largely of evidentiary matter (Tr. 1–32). On respondents' motion, the district court dis-

missed that complaint with leave to file an amended complaint, on the ground, *inter alia,* that the complaint contravened Rules 8 (a) and 8 (e), (R. 10, 11). Subsequently, an amended complaint—the one here involved—was filed. Respondents again moved to dismiss, or in the alternative, to strike, the amended complaint (R. 7, 8). The district court granted the motion to dismiss, again indicating as one of the grounds of the dismissal that the complaint failed to comply with Rule 8 (a).[5] It stated (R. 9):

> Plaintiff in preparing his amended complaint has made an effort to comply with Rule 8 (a) and Rule 8 (e) Federal Rules of Civil Procedure. A comparison of the amended complaint with the original complaint reveals no change in substance.

The court below obviously understood the district court to have grounded its dismissal of the complaint on the failure to comply with Rules 8 (a)

[5] The denial of the motion to strike does not support petitioner's contention that the district court did not hold that the complaint contravened Rule 8 (a) (Pet. 10). Respondents in their motions were not requesting the court both to strike and to dismiss but rather presented these motions as alternatives (R. 7, 8). Moreover, a motion to strike is inconsistent with a motion to dismiss, and therefore the court could not have granted both. Hence, since the district court's action was based on additional deficiencies in petitioner's pleadings which deficiencies are more properly disposed of by dismissal of the complaint, the court properly granted the motion to dismiss, while denying the motion to strike.

and 8 (e), and hence, by affirming that holding, merely ruled that the district court's holding was not so clearly erroneous as to require reversal. *Renshaw* v. *Renshaw,* 153 F. 2d 310 (App. D. C.).

Nor is there any merit to petitioner's related contention that the court below erred in so limiting its holding and thereby not passing on the two points which petitioner specifically appealed. An appellate court clearly is not bound to pass on the points appealed by an appellant if there are adequate other grounds on which to dispose of the case. It has long been settled law that when a cause may be disposed of on a number of grounds, the court has discretion to select one or more of them on which to base its opinion, and is not limited to either the grounds on which a lower court based its holding nor the points on which an appeal is taken. *Patterson* v. *United States,* 2 Wheat. 221, 224; *Garland* v. *Davis,* 4 How. 131, 143; cf. *American Stevedores, Inc.* v. *Porello,* 330 U. S. 446; *Vanderbank* v. *Owens-Illinois Co.,* 311 U. S. 538; *Carpenter* v. *Wabash Ry. Co.,* 309 U. S. 23.

2. Petitioner's contention (Pet. 7, 11) that the court failed to give proper effect to *Dinsman* v. *Wilkes,* 7 How. 89, 12 How. 390, in holding that although the complaint characterized respondents' "alleged conduct as wrongful, unlawful, and malicious, it does not sufficiently disclose the conduct to enable a court to judge whether or not it was

tortious" is likewise unsound. In so holding, the court below did not deny that as a matter of substantive law a government officer might, in certain circumstances, be liable for tortious acts, but it ruled that, as a matter of pleading, general allegations of "wrongful, unlawful, and malicious" are not sufficient alone to disclose the conduct on which the complaint is based. The *Dinsman* case dealt with the substantive right to recover for tortious action of government officers; it did not consider how properly to frame a complaint seeking such recovery.

Furthermore, it is settled that, as matter of pleading, general allegations of malice and bad faith add nothing to a complaint seeking damages for conspiracy and tortious conduct of public officials. *Lang* v. *Wood,* 92 F. 2d 211, 212 (App. D. C.), certiorari denied, 302 U. S. 686; *Standard Nut Margarine Co.* v. *Mellon,* 72 F. 2d 557 (App. D. C.), certiorari denied, 293 U. S. 605; *Jones* v. *Kennedy,* 121 F. 2d 40, 45 (App. D. C.), certiorari denied, 314 U. S. 665. Nor does the allegation of conspiracy aid petitioner in stating a claim, since the gist of a civil action for conspiracy is the overt or tortious act complained of (*Nalle* v. *Oyster,* 230 U. S. 165; *Edwards* v. *James Stewart & Co.,* 160 F. 2d 935 (App. D. C.); *Cooper* v. *O'Connor,* 99 F. 2d 135, 142 (App. D. C.), certiorari denied, 305 U. S. 643; *State of Missouri* v. *Fidelity and Casualty Co.,* 107 F. 2d 343 (C. C. A. 8); *Lewis*

Invisible Stitch Machine Co. v. *Columbia Blindstitch Machine Mfg. Co.*, 80 F. 2d 862 (C. C. A. 2); *Hansen* v. *Nicoll*, 40 App. D. C. 228), and the sole function of the conspiracy allegation is to connect the various respondents to the tortious act, once such act had been alleged.[6] Cf. *United States* v. *Griffith Amusement Co.*, 1 F. R. D. 229 (W. D. Okla.).

Absent these allegations, the complaint clearly did not state a claim upon which relief can be granted. In the first place, there is nothing in the complaint indicating that petitioner suffered any injury or damage as a result of the acts and statements complained of.[7] Secondly, at the time of the episodes described in the complaint, petitioner and all the respondents were Army officers.

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[6] The complaint here is deficient in this respect as well since in all his allegations petitioner uses "defendants" as a generic term including all the respondents, and there is no particular act alleged connecting each of the respondents with the conspiracy. *United States* v. *Griffith Amusement Co.*, 1 F. R. D. 229 (W. D. Okla.).

[7] For instance, petitioner alleged that a statement had been falsely made that he had "committed a terrible crime" (R. 4), and that a false newspaper report had been published that he "had, at a dance, performed a 'solo dance'" (R. 5). Neither of these statements would be actionable *per se*. The first was merely a conclusion by the speaker as to the nature of the crime, and plainly had no necessary connotation that petitioner had committed a crime involving moral turpitude. Cf. *Pollard* v. *Lyon*, 91 U. S. 225; *Meyerson* v. *Hurlbut*, 98 F. 2d 232 (App. D. C.), certiorari denied, 305 U. S. 610. The second, respecting the solo dance, had no defamatory connotation.

There is no allegation in the complaint that any of the acts or statements complained of were "manifestly or palpably" beyond the scope of respondents' official authority. *Spalding* v. *Vilas,* 161 U. S. 483, 498; *Cooper* v. *O'Connor,* 99 F. 2d 135, 138, 139 (App. D. C.), certiorari denied, 305 U. S. 643. As a matter of substantive law, it is clear that government officials may be held personally liable only for acts which are manifestly and palpably beyond their authority, and that notwithstanding *Dinsman* v. *Wilkes, supra,* motive for so acting is immaterial where the act complained of is within the scope of the official's authority. *Spalding* v. *Vilas,* 161 U. S. 483; *De Arnaud* v. *Ainsworth,* 24 App. D. C. 167; *Cooper* v. *O'Connor,* 99 F. 2d 135 (App. D. C.), certiorari denied, 305 U. S. 643, and cases there cited; *Jones* v. *Kennedy,* 121 F. 2d 40 (App. D. C.), certiorari denied, 314 U. S. 665; *Laughlin* v. *Garnett,* 138 F. 2d 931 (App. D. C.), certiorari denied, 322 U. S. 738. The reason given for this rule of immunity is simply one of public policy. "Otherwise the perfect freedom which ought to exist in discharge of public duty might be seriously restrained, and often to the detriment of the public service." *De Arnaud* v. *Ainsworth,* 24 App. D. C. 167, 178; *United States to the use of Parravicino* v. *Brunswick,* 69 F. 2d 383, 386 (App. D. C.); *Cooper* v. *O'Connor, supra,* at 141–142; cf. *Dawkins* v. *Paulet,* L. R. 5 Q. B. 94, 114. Petitioner's com-

plaint may well be analogized to that of "the private in the rear rank" whose life is made miserable by the "hard-boiled top sergeant" (cf. *Cooper* v. *O'Connor, supra,* 99 F. 2d at 142). We submit that petitioner in his complaint had stated no greater claim upon which relief could be granted.

CONCLUSION

The decision below is correct, there is no conflict with any applicable decision of this Court, and no question warranting further review is presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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